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THE SCOPE OF AUTHENTICATION BY SIGNATURE.

Where the law requires, as evidence of a transaction or contract, a writing signed, or signed and witnessed, the quesion often arises, just what constitutes writing which is authenticated by the signature. The answer must be determined by (1) the physical unity of the writing, (2) its rhetorical unity, (3) oral testimony. By rhetorical unity is intended that internal sense, coherency and consistency which characterize a complete legal instrument.[1]

Of the three tests or proofs, that of rhetorical unity is essential and controlling. Mere physical juxtaposition of writings is unavailing to effectuate them as a single writing in the absence of rhetorical unity. *In re Drummond*, 2 Sw. and Tr. 8; *In re Tovey*, 47 L. J. P. 63.

Oral testimony may be received in aid of rhetorical unity (*Allen v. Maddock*, Moore, P. C. C. 427), but not to unite documents whose rhetorical structure is clearly distinct. To allow the latter would clearly violate the so-called parol evidence rule.

But is rhetorical unity sufficient in the absence of physical juxtaposition? With the exceptions hereafter noted, this question has uniformly been answered in the affirmative. It has arisen in cases divided by the books into four classes:

1. Those which hold that a memorandum in writing under the statute of frauds may be made up of two or more documents provided they refer to each other. 29 A. and E. Ency. Law (2d ed.) 850.

1. *Cf. Barnewell v. Murrell*, 18 So. 831 (Ala.).

2. Those which hold that a will may consist of several loose sheets. *Rood on Wills*, §248.

3. Those which hold that a will may "incorporate" into itself an extrinsic document. *Rood*, §251.

4. Those which hold that a codicil well executed effectuates a will previously revoked, a will never well executed, or ineffectual because of undue influence, or want of capacity, and that it makes the will speak as of its own date. *Rood on Wills*, 396.

A noteworthy matter in connection with *Bryan's Appeal*, 77 Conn. 240, is its recognition of the identity of the principle underlying classes one and three. This identity seems also to be assumed by the court in *Allen v. Maddock*, 11 Moore, P. C. C., 427 (the leading English case on the subject of incorporation). Except for the implication of the opinion in this last case, *Bryan's Appeal* stands alone in this recognition.

The identity of the principle on which classes one and two are based is strongly and clearly stated in *Barnewell v. Murrell*, 18 So. 831 (Ala.).

Professor Chaplin, in an article on incorporation, in Volume II of the *Columbia Law Review*, clearly proves the identity of principle underlying classes three and four.

As Professor Chaplin's purpose is to show (as he clearly does) that *Booth v. Baptist Church*, 126 N. Y. 215, is not only based on insufficient or misconceived authorities, but is also inconsistent with many other decisions in New York, he confines his examination of decisions to cases decided in New York. The authorities on the subject of republication by codicil outside of New York make his position even clearer. They hold that republication by codicil referring to the will validates: (1) a will never well executed[2]; (2) a will originally the product of undue influence[3]; (3) a will made when the testator did not have testamentary capacity[4]; (4) a gift made by will to a subscribing witness[5]; (5) it also renders it unnecessary to prove due execution of the will[6]; (6) effectuates unattested additions to the will[7]; (7) gives the will the same effect as though first executed at the date of the execution of the codicil.[8]

As to class five above, it is to be noted that an execution not proved is no execution at all. So far as appears, there may have been no valid attestation, the testator my have been incapable, etc. *De non apparentibus et non existentibus eadam est ratio.*

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2. *Beale v. Cunningham*, 3 B. Mon. (Ky.) 390; *Harvey v. Chouteau*, 14 Mo. 587; *Burge v. Hamilton*, 72 Ga. 568.

3. *O'Neall v. Farr*, 1 Rich. Law (S. C.) 80.

4. *Brown v. Riggin*, 94 Ill. 560.

5. *O'Neall v. Farr, supra; Morfield's Will*, 74 Iowa 429.

6. *Hobart v. Hobart*, 154 Ill. 610; *McCurdy v. Neal*, 42 N. J. Eq. 333.

7. *Wikoff's Appeal*, 15 Pa. St. 281; *Hubbard v. Hubbard*, 198 Ill. 21.

8. *Whitings' Appeal*, 67 Conn. 379; *Giddings v. Giddings*, 65 Conn. 149.

It is difficult to see, and no authority points out, how anything less than a full execution by a testator, free from undue influence, and with testamentary capacity (all of such facts being duly proved), can avail to differentiate a paper called a will, referred to by a codicil, from any other extrinsic document referred to in a will. In the absence of such execution, so proved, they are on precisely the same footing.

One reason for holding rhetorical unity a sufficient test of the scope of authentication without the additional requirement of physical juxtaposition, stated in *Jones v. Habersham*, 63 Ga. 146, 157, is the impracticability of setting any satisfactory standard of physical unity. To hold the joining of two sheets by tape, or by sealing wax, or by staples, etc., requisite to satisfy the law, would be to add another technicality to a law already sufficiently technical to furnish numerous pitfalls for the unwary. Another reason which might be suggested is that a requirement of physical juxtaposition under any standard, which would be practicable, would not furnish any extraordinary degree of protection beyond that afforded by the requirement of rhetorical unity. Even then, blank spaces might be filled, fastenings might be removed and papers substituted, and an indefinite variety of frauds perpetrated. No more, if as much, igenuity would be required to fit the papers together, so as to give such an appearance of physical unity as would be necessary to make an interpolation which would be consistent and harmonious with the original document.

It would seem that classes two, three and four are really identical, and that to hold a will well executed, though contained on several sheets, and to give republication the effect stated above, while repudiating the doctrine of incorporation, is to introduce a serious inconsistency into the law.

Such an inconsistency exists in New York. *Booth v. Baptist Church*, 126 N.Y. 215, decides that the doctrine of incorporation does not obtain in New York. Yet it is held in *Caulfield v. Sullivan*, 75 N. Y. 153, that proof of a codicil which refers to a will is sufficient proof of the will; in *Cook v. White*, 43 App. Div. 388, affirmed 167 N. Y. 588, that a codicil effectuates a will to which it refers, though the will was made without testamentary capacity; in *Mooers v. White*, 6 Johns Ch. 360, that a codicil, referring to a will, validates a gift, in the will, to a subscribing witness of the will; in *Brown v. Clark*, 77 N. Y. 309, that a codicil referring to a revoked will revives it. See also *Re Piffard*, 111 N. Y. 410; *Re Snell*, 32 Misc. N. Y. 611; *Re Fitzgerald*, 33 Misc. N. Y. 325; *Re Douglass*, 38 Misc. 609, which show how narrowly *Booth v. Baptist Church* is constructed by the courts of New York.

Whether the doctrine of incorporation obtains in Connecticut is still uncertain. *Bryan's Appeal*, *supra*, as well as *Phelps v. Robbins*, 40 Conn. 250, leaves the question undecided. To guide the lawyer seeking light on this subject we have, on the one hand, the strong *dictum* of Judge Carpenter in *Phelps v. Robbins*,

that the law of Connecticut forbids incorporation, and a statement in *Crosby v. Mason*, 32 Conn. 486, that the paper referred to in the will there construed could be used as a means of identification, but not to make out a gift. To this is added the acquiescence of Judge Gager (before whom *Bryan's Appeal* was tried) in the doctrine of *Phelps v. Robbins*. After stating that Judge Carpenter's remarks were *dicta*, he says (printed record *Bryan's Appeal*, p. 45):

"But the Court in that case, at some length and with some care, expressed its opinion, upon what it conceived the law was, and what it would be found to be if any question arose when it was necessary to determine that specific point. And here again it is to be noticed that the Court adopts the distinction between descriptive and dispositive papers, and repudiates the claim that dispositive, extraneous papers can be introduced into a will by reference.

"Now, granting that the statements are *obiter*, they are yet the formal and emphatic expression of a suggestion by our Supreme Court as to what the law probably is upon this question. The reasoning of Judge Carpenter commends itself to my judgment, and I adopt it, and hold that the admission of this letter would override the statute already referred to."

On the other hand, we have the conflict of this position with the great weight of authority; its inconsistency with *Giddings v. Giddings*, 65 Conn. 149, and *Whiting's Appeal*, 67 Conn. 379, which hold that the execution of a codicil referring to a will gives the latter the same effect as though first executed at the date of the codicil, and the fallacy of the attempt made in *Phelps v. Robbins* to distinguish between dispositive and identifying papers. The paper admitted by *Crosby v. Mason* as identifying is dispositive within the standard set by *Booth v. Baptist Church*, 126 N. Y. 215. To render certain and effectual a bequest or devise, otherwise ineffectual because uncertain, is as much to make a will by extrinsic documents as to make out a whole bequest by the use of such documents. Further, the cases above cited upon the subject of republication show that the more testamentary the extrinsic paper is, the more certain it is to be incorporated.

The statement in *Bryan's Appeal* of the requirement, that there must be a clear, explicit, unambiguous reference to a specific document as one existing and known to the testator at the time his will was executed, follows many of the authorities.

An examination of the cases, however, seems to show that, while a reference to a paper as a document to come into existence in the future is insufficient, a reference to a paper in terms which would apply equally well to a future or a past document is sufficient, if the evidence shows that the document was executed before the will.

Theobald on Wills, page 55, states the law as follows:

"It has been said that the document must not only in fact be in existence, but also that it must be described as existing.

"It would seem, however, that if the document is proved to be in existence at the time of the will and is sufficiently identified with the description in the will, it is not necessary that it should be actually described as in existence."

In re Truro, 1 P. and D. 201, holding that language in a will, sufficient if read in the light of the facts as they existed at the time of the execution of a codicil, would have been insufficient if read in the light of the facts existing at the execution of the will; and *In re Yockey*, 29 L. T. 699, where the court said that the language, unexplained by evidence as to the surrounding circumstances, left it perfectly uncertain whether the paper was regarded by the testator as in existence or not, but held it sufficient, strongly confirms this statement.

The more accurate statement of this requirement would seem to be that the language of reference must not point to a future instrument. *Harrison Hewitt.*

THE CONTROL OF THE COURTS OVER THE INTENT OF THE LEGISLATURE.

When the highest court in perhaps the leading American state boldly deserts a line of reasoning which heretofore it has announced to be the settled doctrine in a large number of carefully considered cases and by the same decision overrules the manifest intent of the legislative act passed in presumable reliance upon those decisions, in order to secure what it considers substantial justice, the decision is well worth careful study. This the Court of Appeals of New York has done in *Griffin v. Interurban Street Railway Co.*, 72 N. E. 513, a case relating to the imposition of cumulative penalties. In this case the charter of the company imposed as a condition where different street railways were consolidated, that free transfers should be given within certain defined limits in the city of New York. The Legislature imposed a penalty of $50 "for every refusal" of such transfer. The plaintiff, Griffin, having been refused transfers at four different times, brought suit for $200. The Court, by Bartlett, J., after referring to *People v. N. Y. C. R. R.*, 13 N. Y. 78; *Suydam v. Smith*, 52 N. Y. 383, and *Grover v. Morris*, 73 N. Y. 473, where under similar wordings cumulative penalties had been allowed, said:

It is quite obvious that the legislative intention to permit the recovery of cumulative penalties for refusals of the defendant to comply with provisions of the Railroad Law in regard to the transfer of passengers is as clearly manifested as in any of the cases cited. Notwithstanding this fact, a majority of my brethren are of the opinion that while the rule for the recovery of cumulative penalties, as already adverted to, is firmly established by the earlier decisions of the court, yet the changed